No. SC86269

IN THE SUPREME COURT OF MISSOURI

KAREN F. TRIMBLE,

Respondent/Cross-Appellant,

v.

TIMMI ANN PRACNA,

Appellant/Cross-Respondent.

ON TRANSFER AFTER OPINION OF THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

APPELLANT'S SUBSTITUTE OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Greene County, Missouri. This action was commenced when plaintiff, Karen Trimble d/b/a A-Advanced Bail Bonds,[1] filed a second amended petition for damages against defendants Timmi Ann Pracna and Treveillian Heartfelt. A judgment for damages in favor of plaintiff and against defendants was entered on March 11, 2003. On April 9, 2003, defendant Timmi Ann Pracna filed her Notice of Appeal.

This appeal does not involve the validity of any treaty or federal statute, the validity of a statute or provision of the Constitution of Missouri, construction of the revenue laws of the State of Missouri, title to any state office, or any offense punishable by a sentence of death or life imprisonment. Therefore, under Article V, Section 3 of the Constitution of Missouri, the Missouri Court of Appeals, Southern District, had general appellate jurisdiction to hear this appeal.

[1] The parties will be referred to in the brief as either plaintiff or defendant or by their respective surnames.

STATEMENT OF FACTS

I. Prior Appeal

This case was the subject of a previous appeal before this Court. That appeal arose from a judgment which was entered on August 19, 1999 denying plaintiff Karen Trimble any damages on her claim for breach of contract and finding in favor of defendant Pracna on plaintiff's claim for fraud and conversion. *See Trimble v. Pracna*, 51 S.W.3d 481 (Mo.App. 2001) (herein referred to as "Trimble I") (A. 025, *et seq.)*. In Trimble I, this Court reversed the trial court judgment and directed a retrial for damages only on plaintiff's claim for breach of contract against defendants Pracna and Heartfelt, and as to both liability and damages on plaintiff's claim for fraud and civil conspiracy against defendant Pracna only.

II. Retrial

Following the decision in Trimble 1, plaintiff filed her Second Amended Petition, restating her claims for breach of contract, fraud and civil conspiracy, and adding a claim for abuse of process. (L.F. 25-63)[2] Defendant Pracna filed an answer and an amended counterclaim seeking a refund for an overpayment and damages for conversion. (L.F. 64-100) The trial court granted plaintiff's motion to strike defendant Pracna's counterclaim before trial (L.F. 19) and plaintiff dismissed her claim for abuse of process voluntarily before trial commenced. (L.F. 287) At the conclusion of the jury trial, plaintiff elected to submit her claims for breach of contract and fraud, but did not submit her claim for civil conspiracy. (L.F.

[2] All references to the record on appeal shall appear as follows: Legal File (L.F. __), Transcript (TR. __), Exhibit (Ex. __) or Appendix (A__).

300-322) The jury returned a verdict on plaintiff's breach of contract claim for damages in the amount of $144,420, and found in favor of plaintiff on her claim for fraud and assessed damages against Ms. Pracna in the amount of $28,900. The jury also assessed punitive damages against defendant Pracna in the amount of $146,000. Following the verdict, the trial court assessed attorneys' fees of $48,380.70 and expenses of $12,324.67 against defendants Pracna and Heartfelt on plaintiff's claim for breach of contract, making the total judgment on plaintiff's breach of contract claim $152,429.92, and $174,900 on the fraud claim. The final judgment was entered on March 11, 2003 (L.F. 323-327, A. 001-005) and the court overruled all post trial motions on April 4, 2003. (L.F. 24) Defendant Pracna then filed her Notice of Appeal on April 19, 2003. (L.F. 24, 418-496) Plaintiff Trimble filed her Notice of Appeal on April 14, 2003. (L.F. 24,497-512)

III. Parties

Plaintiff Karen Trimble has worked as a bail bond agent since 1989. (TR. 12-13) In December 1994, plaintiff obtained a license from the Missouri Division of Insurance to open her own bail bond business known as "A-Advanced Bail Bonds." (TR. 15, 17) It was a sole proprietorship. (TR 761) A-Advanced Bail Bonds sought, and obtained, approval to write bonds with courts in several Missouri counties, including Taney County. (TR. 19)

Defendant Timmi Pracna is a resident of Ketchum, Idaho. (TR. 1052) She has a master's degree in speech pathology and practiced speech pathology in Tacoma, Washington. (TR. 1296-1297) Ms. Pracna has adopted three children, and at the time of the events at issue in this case, was unmarried. (TR. 1298-1299) Her primary sources of income in 1995 came

from investments and rental income from apartments that she owned in the State of Washington. (TR. 1302)

Ms. Pracna was introduced to Treveillian Heartfelt by a mutual friend around October 1988. (TR. 1052, 1300, 1336) Mr. Heartfelt claimed to have been a musician who either wrote or co-wrote a number of songs, including Moon Dance and Brown Eyed Girl. (TR. 172-173, 1337) Ms. Pracna and Mr. Heartfelt began a dating relationship. (TR. 1337)

In 1990, Mr. Heartfelt was arrested in the State of California and the State of Idaho for drug violations, theft and forgery. Ms. Pracna assisted Mr. Heartfelt in obtaining bail bonds in Idaho and in California. (TR. 1077-1078, Ex. 46A-E) Mr. Heartfelt failed to appear for the California charge in March 1990 as required by one of the bonds because he was incarcerated in Idaho. (TR. 1802) All of these bonds were ultimately exonerated without any forfeitures or losses by the bonding company. (TR. 1802) The representative from the bonding company issuing the bonds (American Eagle Bail Bonds) found Ms. Pracna to have been completely truthful in her dealings with him. (TR. 1802) Three of those bonds indicated that Mr. Heartfelt used alias names. (TR. 1342-1343; Ex. 46B, 46D, 46E) Ms. Pracna did not sign those bonds and had never known Mr. Heartfelt to use aliases at the time she posted the bonds. (TR. 1342-1343)

Mr. Heartfelt was subsequently convicted of burglary and forgery in 1991, including forgery of checks taken from Ms. Pracna. (TR. 1063) He was imprisoned for approximately four years until his release in February 1995. (TR.1063-1064) Ms. Pracna wrote letters on behalf of Mr. Heartfelt to secure his release from prison. (TR. 1158)

After Mr. Heartfelt was released from prison, he went to live at the Pracna home. (TR. 1166) In June 1995, however, he left Idaho and went to Reno, Nevada. (TR. 1171-1172) While in Reno, Mr. Heartfelt became involved with Carolyn Hanson, a blackjack dealer. (TR. 1901) According to Ms. Hanson, Mr. Heartfelt stayed with her for approximately 5-6 weeks. (TR. 1901) Around July 9, 1995, Mr. Heartfelt left Reno in a Lincoln Town Car rented by Ms. Hanson. (TR. 1903) He was subsequently arrested in Taney County, Missouri, on July 23, 1995. (TR. 1351) He called Ms. Pracna from the Taney County jail and asked that she join him in Branson, Missouri so they could take care of a land transaction in the State of Tennessee. (TR. 1351-1352) Mr. Heartfelt told Ms. Pracna that he would be released from jail by the time she arrived. (TR. 1352-1353)

IV. Issuance of Bail Bonds

When Ms. Pracna arrived in Branson, she was surprised to find out that Mr. Heartfelt was still being held at the Taney County jail. (TR. 1352) He asked her to contact attorney Randall Wood and to secure his release from jail. (TR. 1352-1353) When Ms. Pracna met Mr. Wood on August 11, 1995, he indicated that he was about to leave on vacation and suggested she contact plaintiff Trimble at A-Advanced Bail Bonds to obtain a bail bond. (TR. 33-34, 884, 1353) Mr. Wood called Ms. Trimble to let her know that Ms. Pracna would need her services. (TR. 31)

Ms. Pracna did contact Ms. Trimble late on August 11, 1995 to arrange for a bail bond for Mr. Heartfelt. (TR. 1353-1354) When Ms. Pracna met Ms. Trimble in person in Ozark, Ms. Pracna learned that the bond to secure the release of Mr. Heartfelt on a stolen vehicle charge was $25,000. (TR. 34, 1354) Ms. Pracna agreed to pledge one of her duplexes in the

State of Washington as collateral for the bond. (TR. 35, 1354) Ms. Trimble and Ms. Pracna then visited the office of local title insurance company where Dyann Engel prepared a promissory note and deed of trust to secure Ms. Pracna's obligations under the bail bond. (TR. 63-66, Ex. 5, 6)

Ms. Pracna completed the bail bond application form given to her by Ms. Trimble. (TR. 35-36, Ex. 1) In the application form, among other things, Ms. Pracna disclosed that:

(a) Mr. Heartfelt had a nickname of "Chance";

(b) Ms. Pracna had income of in excess of $100,000 per year;

(c) Mr. Heartfelt had been previously convicted of a crime and was on parole; and

(d) The name of Mr. Heartfelt's parole officer.

Ms. Trimble recalls that Ms. Pracna said that Mr. Heartfelt had been in jail in Idaho and that it had "cost her a lot of money to get him out." (TR. 60-61) The application does not request information about any prior bonds or court appearances. (TR. 558)

Ms. Trimble and Ms. Pracna went to the Taney County jail still later on August 11, 1995 to complete the bonding process for Mr. Heartfelt. (TR. 68) Before leaving to go to the jail, however, Ms. Trimble learned that Mr. Heartfelt had also been charged with passing a bad check and the bond on the second charge was $50,000. (TR. 38)

Dianna Long, the assistant prosecuting attorney assigned to Mr. Heartfelt's case, spoke with both Ms. Pracna and Ms. Trimble about Mr. Heartfelt. (TR. 75, 1306-1307, 1330) Ms. Long told both of them that Mr. Heartfelt should not be bonded out of jail because "he's got a rap sheet as long as you are tall" and "if you bond him, he'll never be back here." (TR. 76, 1307-1308) Ms. Long also told Ms. Trimble that Mr. Heartfelt had numerous aliases and that

he was an escapee from the Department of Corrections in Idaho. (TR. 308) Ms. Long thought that Mr. Heartfelt would run. (TR. 554, 1307, 1309) Ms. Trimble told Ms. Long, however, that she was fully secured so there was no problem. (TR. 1308) Notwithstanding Ms. Long's warnings, Ms. Trimble issued two bail bonds in the total amount of $75,000 to release Mr. Heartfelt from jail. (TR. 79)

As Mr. Heartfelt was leaving the jail, he was rearrested. (TR. 82, 1383) That arrest came because Ms. Long had filed additional charges alleging that Mr. Heartfelt had jumped his parole in the State of Idaho. (TR. 83, 1314) The bond for this third charge was set at $250,000 (TR. 86, 1383) Ms. Long acknowledged that a $250,000 bond was unusually high, given the charges that Mr. Heartfelt faced. (TR. 1333) While Ms. Long was speaking with Ms. Trimble and advising her not to release Mr. Heartfelt from jail, Ms. Long had her criminal files with her and she offered to show them to Ms. Trimble. (TR. 1315-1316) The criminal files which Ms. Long offered to show to Ms. Trimble indicated that Mr. Heartfelt had used at least three other aliases. (TR. 656-657, Ex. 190)

After the bond was set at $250,000, Ms. Trimble and Ms. Pracna had a discussion about whether or not the bond could be reduced and agreed to meet the next day (Saturday) at a restaurant near the Taney County jail to discuss whether or not the $250,000 bond would be written. (TR. 86-88, 100-101, 1386, 1393) During the evening, Ms. Trimble ran a credit check on Ms. Pracna and Mr. Heartfelt. The credit check for Ms. Pracna showed that she had perfect credit. (TR. 92-93) On Mr. Heartfelt's credit check, however, there was a "safe scan" warning. That warning indicated to Ms. Trimble that there was no information listed under the name of Treveillian Heartfelt or his social security number and birth date. (TR. 94) Upon

separate inquiry, both Ms. Pracna and Mr. Heartfelt later told Ms. Trimble that his name did not appear on the credit check because he had entered the federal witness protection program as a result of testimony he had given against a member of a Colombian drug cartel. (TR. 95, 102-103)

Even though Ms. Trimble had concluded that Mr. Heartfelt would run on the bonds (TR. 657-658), the next day she went ahead and also wrote the $250,000 bond to release Mr. Heartfelt from jail. (Ex. 3) When she went to meet Ms. Pracna that Saturday morning, Ms. Trimble brought along Pat Yarberry, a secretary to attorney John Waters, who had prepared three separate quit-claim deeds describing pledged rental property owned by Ms. Pracna. (TR. 99, 560, 771-772, Ex. 8, 9, 10) After Mr. Heartfelt was released from jail, Ms. Pracna, Ms. Trimble, Ms. Yarberry and Mr. Heartfelt went to a lounge in Hollister. (TR. 109) Mr. Heartfelt rode with Ms. Trimble and Ms. Yarberry to the lounge and during the trip, he told Ms. Trimble that he had once before considered skipping out on Ms. Pracna, but decided not to. (TR. 786) At the lounge, some language was added to the quit-claim deeds by hand, which was acceptable to Ms. Trimble, and Ms. Pracna signed the deeds and gave them to Ms. Trimble. (TR. 112-115, 137, 593-594, Ex. 8, 9, 10) Mr. Heartfelt was required to make an initial court appearance on the stolen vehicle charge on August 16, 1995 and Ms. Trimble reminded him and Ms. Pracna that he needed to appear at that time.

V. Bond Premiums

The standard premium for the bail bonds was ten percent (10%) of the face amount of the bonds. (TR. 13-14, 567) Ms. Trimble usually collects the premium prior to issuing the bond. (TR. 625) In this instance, however, Ms. Trimble did not receive the sum of $32,500

before issuing the bonds. (TR. 110-111, 554) Instead, she received a check from Ms. Pracna in the amount of $7,500, but she did not deposit the check until August 29, 1995, over two weeks later. (TR. 88, 627; Ex. 4)

Ms. Trimble testified that the reason she did not obtain the premium before issuing the bonds to release Mr. Heartfelt was because she had agreed to accept payment of the premium from Mr. Heartfelt, and not from Ms. Pracna. (TR. 625-626) The Bond Indemnity Agreement contained a line for Ms. Trimble to indicate the amount of the premium for the bonds, but the premium amount was not inserted. (TR. 626-627, Ex. 1) In addition, the promissory note signed by Ms. Pracna in favor of A-Advanced Bail Bonds was in the principal amount of $325,000 (the face amount of the three bonds), but did not include the additional $25,000 unpaid bond premium. (TR. 626-627, Ex. 7) Ms. Trimble admitted that the first time she made demand for any additional money from Ms. Pracna was in early September 1995 when she called and asked Ms. Pracna to send $50,000 (to cover one of the bonds if it was called). (TR. 630-633) An instruction about Ms. Pracna's only obligation for the premium to be the $7,500 was tendered to the Court, but refused. (TR. 1587, A. 017)

Notwithstanding Ms. Trimble's testimony about her agreement with Mr. Heartfelt regarding the bond premium, during closing argument, counsel for defendant Pracna attempted to argue that Mr. Heartfelt was responsible for the balance of the bond premium ($25,000) and not Ms. Pracna. (TR.1644-1693) The trial judge sustained the objections of Ms. Trimble's counsel to that argument and instructed the jury that "it's up to me to determine the amount of damages" and instructed the jury that Ms. Pracna owed the $25,000 bond premium as a matter of law. (TR. 1644-1645, 1659, 1662-1663, 1682-1693, 1706-1710)

VI. August 16th Appearance Date

Mr. Heartfelt did appear before the Taney County Circuit Court on August 16, 1995 as instructed. (TR. 131, 1400) Ms. Trimble was present. (TR. 1400-1401) During the appearance, one of the charges against Mr. Heartfelt (felony car tampering) was dismissed. (TR. 1318)

Ms. Trimble did not complain during that court appearance that Mr. Heartfelt or Ms. Pracna had failed to pay any part of the bond premium. (TR. 629) Although she had the right to do so, Ms. Trimble did not request the court revoke the bonds she had written for the benefit of Mr. Heartfelt. (TR. 629, Ex 1)

Mr. Heartfelt's next appearance date was set for August 23, 1995. (TR. 142-143, Ex. 11)

VII. Heartfelt Flees

After the August 16, 1995 court appearance, Mr. Heartfelt and Ms. Pracna began their journey to LaFollette, Tennessee to complete the land transaction which Mr. Heartfelt had promised Ms. Pracna. (TR. 1401) Ms. Pracna encountered brake problems with her camper truck and, therefore, rented a car in Nashville, Tennessee. (TR. 1401-1402) On August 22, 1995, she and Mr. Heartfelt were in the Edgar Evans State Park in Tennessee, east of Nashville. (TR. 1402) Ms. Pracna had two of her minor children with her at the park. (TR. 1403) One of the children was ill and, therefore, Ms. Pracna planned to use the rental car to drive Mr. Heartfelt back to Forsyth for his court appearance the following day. (TR. 149) Instead, Mr. Heartfelt took the car and said he was going to drive to Forsyth so Ms. Pracna could stay with the children. (TR. 1404-1405) Mr. Heartfelt never appeared on August 23, 1995 as scheduled.

He did call both Ms. Pracna and Ms. Trimble the morning of August 23 to advise them that he had car trouble, but then never came to court. (TR. 152-153)

VIII. Payment by Ms. Pracna

After Mr. Heartfelt absconded, Ms. Pracna returned to her home in Ketchum, Idaho. (TR. 1408) Soon after she arrived, she received a call from her bank and was told a check had been presented on her account in the amount of $7,500 and it would not clear. (TR. 1467) Thinking this was a check written by Mr. Heartfelt, she instructed that the check not be honored. (TR. 1468, Ex. 4) Two days later, she received a call from Ms. Trimble who was quite upset. (TR. 204, 1408-1409) Ms. Trimble told Ms. Pracna she would have her arrested for stopping payment on the check. (TR. 205) She also told Ms. Pracna she needed to send $1,000 to pay for a bounty hunter named Mr. Garrison. (TR. 207) Either that day or the following day, Ms. Pracna wire transferred to the account of A-Advanced Bail Bonds the sum of $8,500. (TR. 207, 553-554; Ex. 4A)

A few days after that money was wired, Ms. Trimble contacted Ms. Pracna and informed her that Ms. Trimble believed that the $50,000 bond would be called. (TR. 206) She asked Ms. Pracna to immediately send her $50,000 to cover that potential forfeiture. (TR. 206) In compliance with Ms. Trimble's request, on September 5, 1995, Ms. Pracna wire transferred an additional $50,000 to the account of A-Advanced. (TR. 1411; Ex. 4A) No money was ever paid into the court on these bonds. (TR. 552-553, 890) Ms. Trimble made no other demands on Ms. Pracna for money under the terms of the Indemnity Agreement until after Mr. Heartfelt was captured. (TR. 569-570)

IX. Bounty Hunters

Under the terms of the bond contract, Ms. Pracna and Mr. Heartfelt were responsible to pay for all costs incurred by A-Advanced Bail Bonds in recapturing Mr. Heartfelt if he absconded. (Ex. 1) Soon after Mr. Heartfelt failed to appear on August 23, 1995, Ms. Trimble began securing the services of bounty hunters to search for Mr. Heartfelt. (TR. 320-322) She first contacted Mr. Garrison, but then became dissatisfied with his services and discharged him. (TR. 233, 561-563)

Mr. Garrison enlisted the aid of Mr. Tim Bruce to search for Mr. Heartfelt. (TR. 454) Mr. Bruce searched for Mr. Heartfelt until October 1995 but was not successful in locating or capturing him. Mr. Bruce did not work for Ms. Trimble and she did not agree to pay him an hourly rate or mileage. (TR. 582) Mr. Bruce ultimately filed a suit against Ms. Trimble for his fees in connection with the search for Mr. Heartfelt. (TR. 580, Ex. 103A) In her answer to Mr. Bruce's petition, however, Ms. Trimble alleged that Mr. Bruce was working on a contingent fee basis which meant that he would only earn a fee if he were able to capture Mr. Heartfelt. (Ex. 104A) Ms. Trimble never paid any bounty hunter fees to Mr. Bruce. (TR. 579-580) Ms. Trimble advanced approximately $3,500 to Mr. Bruce which was in fact a loan to be repaid by Mr. Bruce. (TR. 581) She filed a counterclaim against Mr. Bruce to recover those advances. (TR. 580-581, Ex. 104A)

Although he was listed as one of the bounty hunters for which a claim was made by Ms. Trimble, Mr. Tony Delaughter was never hired by Ms. Trimble. (TR. 578) Ms. Trimble also did not pay any fees or expenses to Mr. Delaughter. (TR. 572, 579) In fact, Ms. Trimble never told Ms. Pracna that she had hired Mr. Delaughter as a bounty hunter. (TR. 579)

At one point, Ms. Trimble claimed that Ms. Pracna owed the sum of $10,000 to pay for a bounty hunter by the name of Mr. Montgomery. (Exs. 127, 127A) She subsequently, however, withdrew and then reasserted her claim for his fees. (TR. 576) Likewise, she made a claim that bounty hunter fees were due to J. Humphrey and Associates. That claim was withdrawn at the close of the evidence. (TR. 579, L.F. 309, A. 009)

Ms. Trimble made a claim for bounty hunter fees for her son-in-law, Todd Warf, in the amount of $10,000. (TR. 584) Mr. Warf made an overnight trip to Florida in an attempt to capture and return Mr. Heartfelt to Taney County, but did not fly out until the day after Mr. Heartfelt had already been captured by the Gainesville Police Department. (TR. 638-1966) Mr. Warf accomplished neither of his objectives (capture or transport) and was never paid anything by Ms. Trimble. (TR. 586, 1965, 1981)

Ms. Trimble also engaged the services of Mr. Richard Hugh as a bounty hunter in the middle of September 1995. (TR. 166-167) She told Mr. Hugh she would pay him $32,500 if he was able to capture Mr. Heartfelt. Mr. Hugh did not have any agreement to be paid an hourly rate or mileage. (TR. 582) Mr. Hugh did not apprehend Mr. Heartfelt. (TR. 984)

X. Efforts to Sell Collateral

Before Mr. Heartfelt was released from jail, Ms. Trimble told Ms. Pracna that she (Ms. Trimble) thought that he would run. (TR. 657-658) In fact, on the same day that she first met with Ms. Pracna (August 11, 1995), Ms. Trimble entered into a listing agreement on the property in Washington with a Washington real estate company. (TR. 596-597, Ex. 161) Shortly after Mr. Heartfelt absconded, Ms. Trimble set about trying to convert the collateral she held in the Washington property into cash. (TR. 282)

To obtain cash from the property of Ms. Pracna, Ms. Trimble recorded the quit-claim deeds. (TR. 119, 594, Exs.8, 9 and 10) She recorded the deeds notwithstanding the language in the deeds which indicated that they were "not to be executed" until after Mr. Heartfelt failed to appear at the appointed court date and after the "case disposition." Ms. Trimble acknowledged she had no right to record the deeds, but proceeded to do so anyway. (TR.688-689)

After recording the deeds, Ms. Trimble attempted to sell one of the properties in October 1995. (TR. 282, 288, 597; Ex. 156) She was unable to close the transaction, however, because the handwritten notes on the quit-claim deeds, which she had previously approved, did not give her clear title. (TR. 283) Notwithstanding that fact, she again attempted to close a sale of the property in December 1995. (TR. 599; Ex 157) That closing, likewise, did not occur because of the title impediments resulting from the handwritten notes on the quit-claim deeds. (TR. 599)

At the urging of Ms. Trimble, Ms. Pracna undertook to raise funds to pay her obligations under the bonds. (TR. 1232-1233) She initiated that process in late October 1995 to obtain a loan in the amount of $495,000 to pay her potential obligation. (TR. 2067-2073; Ex. 175) At the advice of her mortgage broker, she rescinded that first transaction and immediately applied for another loan in the amount of $450,000. (TR. 2074-76; Ex. 179) That loan was approved, but the funds were never disbursed because of disagreements about how the money would be paid out. (TR. 2084)

In December 1995, Ms. Trimble approached Union Planter's Bank about getting a $50,000 loan. On her application (Ex. 169), she identified her assets and liabilities. She

showed no liabilities related to the capture of Mr. Heartfelt, but did list, as part of her assets, Ms. Pracna's property in Washington. (TR. 641-642) Mike Bell was the loan officer handling this matter on behalf of Union Planter's Bank. (TR. 2000) Mr. Bell prepared a credit memorandum (Ex. 171) based upon Ms. Trimble's application and his verbal discussions with her. (TR. 2001) The credit memorandum indicates that:

> Customer has a contract on real estate she owns in the State of Washington that should close in early February. The sale price of the Washington property is $207,500 and the customer has no debt on this land. Ms. Trimble plans to pay off all personal debts and build a new residence on the 13 acres with the surplus cash and a possible construction loan from our bank.

XI. Heartfelt's Capture

After Heartfelt left Ms. Pracna in August 1995, he went to the State of Florida. There he met and befriended Robbie Blake, a secretary who was employed at the University of Florida in Gainesville. (TR. 1093) Ms. Blake met Mr. Heartfelt at the end of August 1995. (TR. 1094) He immediately moved into her residence and paid her rent for the use of her garage to store his car. (TR. 1096-1097) Ms. Blake and Mr. Heartfelt began a romantic relationship and Ms. Blake began to think about marriage. (TR. 1137) Mr. Heartfelt soon began borrowing money from Ms. Blake but never repaid the loans. (TR. 1098-1099) Eventually, Ms. Blake became suspicious of Mr. Heartfelt and discovered evidence that he was on parole. (TR. 1113, 1120) She then contacted his parole officer who put her in touch with A-Advanced Bail Bonds. (TR. 1120-1121, 1140-1142) Mr. Heartfelt was captured by the Gainesville Police Department (not A-Advanced Bail Bonds) on December 18, 1995 with the exclusive assistance

of Ms. Blake. (TR. 368) The following day, Ms. Trimble's son-in-law, Todd Warf, and Mr. Montgomery left Springfield for Florida in an attempt to return Mr. Heartfelt to Taney County. They were, however, unable to do so and returned to Springfield the following day. (TR. 585-586)

XII. Trial

This case was submitted to a jury for trial starting October 15, 2002. (L.F. 21) The jury returned a verdict in favor of plaintiff and against Ms. Pracna and Mr. Heartfelt for damages in the amount of $144,420 on Ms. Trimble's claim for breach of contract. On Ms. Trimble's claim against Ms. Pracna for fraud, the jury returned a verdict for actual damages of $28,900 and for punitive damages of $146,000.

XIII. Assessment of Attorneys' Fee and Application of Credit

By agreement of counsel for the parties, any credit to be given to defendant Pracna for the $58,500 she had paid to the plaintiff and any attorneys' fees due from the plaintiff under her breach of contract claim were to be determined by the judge following the jury verdict. The jury was so instructed. (L.F. 308) The trial judge did grant Ms. Pracna a credit of $58,500 against the judgment for breach of contract to account for the money she had paid to Ms. Trimble. It also, however, awarded attorneys' fees on the breach of contract claim in the amount of $48,380.70 and expenses of $12,324.67. (L.F. 422) The attorneys' fees were based on thirty-three percent and one-half (33½%) of the total contract of damages assessed by the jury without regard to the fact that Ms. Pracna had paid $58,500 in September, 1995 before collection actions were undertaken on the bond contract. (L.F. 422) Ms. Pracna now appeals from the judgment.

POINTS RELIED ON

POINT I

The trial court erred in repeatedly sustaining objections to the closing argument of Ms. Pracna's counsel that Ms. Pracna did not owe the $25,000 balance of the bond premium and by telling the jury that Ms. Pracna owed that sum as a matter of law, because whether Ms. Pracna owed that part of the premium was a disputed fact and the trial court's verbal instruction was improper and misled, misdirected and confused the jury, in that:

(i) There was testimony from both Ms. Trimble and Ms. Pracna that Ms. Trimble had agreed to collect the premium only from Mr. Heartfelt and the previous ruling of this Court and the established facts adopted by the trial court did not preclude such a finding;

(ii) Instruction No. 9 told the jury that they were to determine the damages for breach of contract, but the trial court's verbal instruction told them that the court and not the jury would determine damages and it had already determined that the $25,000 bond premium was owed by Ms. Pracna; and

(iii) The trial court's verbal instruction to the jury violated Civil Rule 70.02(f) as it was an instruction on the law of the case which was not reduced to writing and given to the jury for its deliberation.

Glowacki v. Holste, 295 S.W.2d 135, 139 (Mo. 1956)

Edie v. Coleman, 141 S.W.2d 238, 245 (Mo. 1940)

Martin v. Durham, 933 S.W.2d 921, 924 (Mo.App. 1996)

Civil Rule 70.02(f)

POINT II

The trial court abused its discretion in refusing to submit defendant's withdrawal instruction, Instruction No. B, because the withdrawal instruction would have eliminated the false issue of bounty hunter fees not actually paid or incurred by Trimble, in that there was no substantial evidence that plaintiff incurred or paid the bounty hunter fees described in Instruction No. B so those fees should have been withdrawn from the consideration of the jury.

Anglim v. Missouri P.R. Co., 832 S.W.2d 298, 308 (Mo. banc 1992)

State ex rel. Missouri Highway & Transp. Comm'n v. Wallach, 826 S.W.2d 901, 903-04 (Mo.App. 1992)

Womack v. Crescent Metals Prods., Inc., 539 S.W.2d 481, 484 (Mo.App. 1976)

Kenney v. Wal-Mart Stores, Inc., 100 S.W.3d 809, 814 (Mo. 2003)

POINT III

The trial court erred in failing to sustain defendant Pracna's Motion for Judgment Notwithstanding the Verdict (JNOV), because plaintiff failed to prove each essential element of her claim for fraud by substantial evidence, and in particular, the necessary elements that she reasonably relied upon the statements of Ms. Pracna mentioned in the verdict directing instructions (Instruction Nos. 13-17) in either writing the bonds or hiring bounty hunters, that such statements were material to her decision to either write the bonds or hire the bounty hunters, or that she was damaged as a result of any representations of Ms. Pracna set out in the verdict directors, in that:

(a) Plaintiff wrote the bonds based on the collateral and the "perfect" credit rating of Ms. Pracna, notwithstanding plaintiff's belief that Mr. Heartfelt would run on the bonds after they were written and knowing that he may have used several aliases;

(b) Plaintiff knew that Ms. Pracna was already obligated under the bond contract to pay all costs of recapture at the time any bounty hunters were hired and when Ms. Pracna made statements about the bounty hunters; and

(c) Plaintiff's sole claim for actual damages was for her lost income while searching for Mr. Heartfelt, but she failed to prove such damages because her bail bond business was a sole proprietorship and the business had no history of profits either before or after Mr. Heartfelt absconded.

Empire Gas Corp. v. Small's LP Gas Company, 637 S.W.2d, 239 (Mo.App. 1982)

Consumers Cooperative Ass'n v. McMahan, 393 S.W.2d 552, 556 (Mo. 1965)

Coonis v. Rogers, 429 S.W.2d 709, 714 (Mo. 1968)

Seymour v. House, 305 S.W.2d 1 (Mo. 1957)

POINT IV

The trial court erred in submitting Instruction No. 13, because the instruction was not supported by substantial evidence and it confused, misled and misdirected the jury, in that there was indisputable evidence that plaintiff knew that Mr. Heartfelt may have used aliases and that fact was not relied upon nor was it material to plaintiff when she wrote the bail bonds for him.

Keefhaver v. Kimbrell, 58 S.W.3d 54 (Mo.App. 2001)

Premium Fin. Specialists, Inc. v. Hullin, 90 S.W.3d 110, 115 (Mo.App. 2002)

McCrackin v. Plummber, 103 S.W.3d 178, 181(Mo.App. 2003)

Hepler v. Caruthersville Supermarket Co., 102 S.W.3d 564, 568 (Mo.App. 2003)

POINT V

The trial court erred in submitting Instruction No. 15, because there was no substantial evidence supporting essential elements of Trimble's claim of fraudulent misrepresentations relating to payment of bounty hunter fees, in that: (a) Trimble did not claim or establish any damages for these alleged fraudulent misrepresentations that were distinct from the damages she claimed for breach of contract, and (b) there was no substantial evidence supporting the requisite elements of falsity, materiality, reliance, and damages.

Brown v. St. Louis Pub. Serv. Co., 421 S.W.2d 255, 259 (Mo. banc 1967)

State ex rel. PaineWebber, Inc. v. Voorhees, 891 S.W.2d 126, 128 (Mo. banc 1995)

O'Conner v. Follman, 747 S.W.2d 216 (Mo.App. 1988)

Professional Laundry Mgmt. Sys., Inc. v. Aquatic Techs., Inc., 109 S.W.3d 200 (Mo.App. 2003)

POINT VI

The trial court erred in awarding plaintiff attorney fees equaling $48,380.70, because that sum included $19,597.50 in fees on the $58,500 which was paid by defendant Pracna in compliance with the bond contract before plaintiff retained the services of an attorney, in that under the bond contract plaintiff was only entitled to collect an attorney fee of 33½% on amounts collected with the assistance of an attorney.

Eisenberg v. Redd, 38 S.W.3d 409, 411 (Mo. 2001)

Rodriguez v. Gen. Accident Ins. Co., 808 S.W.2d 379, 382 (Mo. banc 1991)

Graue v. Missouri Prop. Ins. Plcmnt. Fac., 847 S.W.2d 779, 785 (Mo. banc 1993)

Hammond v. Wheeler, 347 S.W.2d 884, 895 (Mo. 1961)

ARGUMENT

POINT I

The trial court erred in repeatedly sustaining objections to defendant's argument that Ms. Pracna did not owe the $25,000 balance of the bond premium and in telling the jury that Ms. Pracna owed that sum as a matter of law, because whether Ms. Pracna owed that part of the premium was a disputed fact and the verbal instruction was improper and it misled, misdirected and confused the jury, in that:

(i) There was testimony from both Ms. Trimble and Ms. Pracna that Ms. Trimble had agreed to collect the premium only from Mr. Heartfelt and the previous ruling of this Court and the established facts adopted by the trial court did not preclude such a finding;

(ii) Instruction No. 9 told the jury that they were to determine the damages for breach of contract, but the verbal instruction of the trial judge told them that the trial court and not the jury would determine damages and it had already determined that the $25,000 was owed by Ms. Pracna; and

(iii) The trial court's verbal instruction to the jury violated Civil Rule 70.02(f) as it was an instruction on the law of the case which was not reduced to writing and given to the jury for its deliberation.

A. Standard of Review

Generally, the Appellate Court reviews the trial court's ruling on closing arguments for an abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601 (Mo. banc 2000). However, errors

committed with respect to the argument about damages are subject to a rebuttable presumption of prejudicial error. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994).

B. Determined Facts

In Trimble I, the court determined that "the judgment as to Count I of plaintiff's Amended Petition is affirmed as to the issue of liability and reversed as to the issue of damages." 51 S.W.3d at 505. Count I is a claim for breach of the bail bond contract. In arriving at its decision, however, the court made no determination that Ms. Trimble was entitled to recover any specific damages, including her claim for recovery of $25,000 for the balance of the bond premium. That issue was specifically left for the jury to determine upon the retrial.

Before the second trial, the trial court had made certain findings of established facts as result of a Motion for Summary Judgment filed by Ms. Trimble. Those established facts were read to this jury at the beginning of the second trial. (TR. 3-6) Among those established facts were the following:

1. "It's also been established that the defendant Timmi A. Pracna wrote and gave to Karen Trimble a check in the amount of $7,500 for the premium for the two bail bonds totaling $75,000 for the release of Treveillian Heartfelt." (TR. 3-4)
2. "It has been established that the total bond premium for the bonds written to obtain the release of defendant Treveillian Heartfelt was $32,500." (TR. 5)

Nothing in the opinion of this court in Trimble I, or in the established facts adopted by the trial court, determined that Ms. Pracna was liable as a matter of law to pay the remaining $25,000 bond premium. During her testimony, Ms. Trimble confirmed that she had in fact

reached an agreement with Mr. Heartfelt whereby he would be solely responsible for the payment of the premium for the bonds issued on his behalf:

"Q. Do you agree, ma'am, that it is customary for you to collect your bond premium when you write the bond?

A. Yes, it is.

Q. And here you agreed to get your bond premium from Mr. Heartfelt, not Ms. Pracna, isn't that true?

A. Mr. Heartfelt asked if he could exchange for or if he could pay the rest when they got back as well as Timmi, and he's the one that asked me if I would just hold her check and he'd exchange it for cash.

Q. Well, the fact is, you agreed to accept the payment of the premium from Mr. Heartfelt, not Timmi, isn't that right?

A. I said that would be fine." (TR. 625, 626)

The same testimony was given by Ms. Pracna:

"Q. And so, did you come to an understanding with her that point?

A. My understanding was that he was going to pay her the bond premium. She asked if I could still use my property to indemnify her on the bond. Not indemnify, I keep saying that word wrong. To give her security on the bond, and I said, "That's an awful lot of money, I'm not sure I want to do that." She talked some more and then we finally decided that he was in danger and we needed to get him out on this bond. So I agreed that I would

put my property on for the $75,000 part and Mr. Heartfelt would pay the bond premium. That was acceptable to Karen Trimble." (TR. 1380, 1381)

Based upon the testimony of Ms. Trimble and Ms. Pracna, during closing argument, counsel for Ms. Pracna attempted to argue that the jury should not assess the $25,000 bond premium against Ms. Pracna, or either defendant, under the bond agreement, because Ms. Trimble and Mr. Heartfelt made a separate agreement concerning the payment of the premium. On four occasions, plaintiff's counsel objected to that argument and, on each occasion, the trial judge sustained the objection and admonished the jury. In fact, the trial judge told the jury that he would be responsible for determining damages and that as a matter of law it had been determined that Ms. Pracna owed the $25,000 for the bond premium.

(Mr. Cowherd): We agree that the bond premium for these bonds, total bond premium was $32,500, but Timmi Pracna signed an agreement, and what you're asked to enforce is what Timmi Pracna signed, this document. Ms. Trimble told you I don't have to charge ten percent (10%), I don't have to charge five percent (5%), I can charge whatever I want for a bond premium. She can make whatever deal she wants.

She made her deal with Mr. Heartfelt, not Ms. Pracna, as part of this deal. She made a separate arrangement with Mr. Heartfelt and because of that there is no bond premium due beyond what's been paid.

(Mr. Crites): Your honor, I object. That's totally contrary to the finding of this court which was announced at the beginning.

(The court): The jury is instructed that liability does attach to Ms. Pracna on Count I, the contract claim under the bond. It's for me to determine the amount of damages. (TR. 1664:16-1645:13) (emphasis supplied)

****

(Mr. Cowherd): Well, the first thing is the bond premium. As we've discussed, the face amount was $32,500; Ms. Pracna paid $7,500, that was paid by wire transfer. And I've told you the agreement was Heartfelt's responsible for this, he's to pay it.

(Mr. Meyers): Your honor, at this time, we object. That violates what the instruction is to the jury about withdrawing certain issues.

(The court): Sustained. (TR. 1659)

****

(Mr. Cowherd): So let's look at what the reasonable expenses appear to be. We're using numbers that we heard today, on the bond premium, $7,500.

(Mr. Meyers): Your honor, once again, we object. This is not a correct statement as to what the evidence and the court has determined—

(The court): Sustained. The court's ruled as a matter of law that Ms. Pracna and Mr. Heartfelt are equally responsible under the bond contract for that. (TR. 1662-1663)

****

(Mr. Cowherd): Now, let's look at the verdict forms that you've been given on these two claims. The first one is a claim on breach of contract. And if you agree that it's $57,501—

(Mr. Meyers): Your honor, we object to this. That is not the figure that was on the bill. That is a figure—has been declared by the court to be another $25,000 higher.

(The court): The jury's instructed to that effect. This is argument. They can disregard that. (TR. 1682:24-1683:11)

After the closing arguments were concluded, counsel for Ms. Pracna asked for a conference with the court and opposing counsel out of the hearing of the jury. During that conference, counsel for Ms. Pracna protested that the court had improperly sustained the objections relating to the bond premium issue and that there was nothing in the findings of fact or in the earlier decision of this court which made a determination about the obligation of Ms. Pracna for that portion of the bond premium. The court nonetheless overruled the objections of counsel for Ms. Pracna and refused to instruct the jury that they should make a determination as to whether Ms. Pracna was liable for the payment of the $25,000. (TR. 1706:2-1710:4)

C. Invading the Province of the Jury

The trial court was mistaken about the impact of the Southern District's decision in Trimble I and its own finding of established facts. The Southern District court did determine in Trimble I that the liability of Ms. Pracna on the bond contract had been established. 51 S.W.3d at 505. It did not, however, discuss the obligation of Ms. Pracna for the bond premium.

Likewise, the established facts adopted by the trial court did not make a determination that Ms. Pracna was liable for the balance of the bond premium. Instead, it simply determined that Ms. Pracna had paid $7,500 toward the bond premium and that the total bond premium due was $32,500. (TR. 3-5) Those findings did not preclude the possibility of Mr. Heartfelt and Ms. Trimble making an agreement separate and apart from the bond contract with respect to the payment of the premium, thereby modifying the terms of the contract. Aside from the direct testimony of Ms. Trimble and Ms. Pracna that such an agreement had been reached with Mr. Heartfelt, there was overwhelming evidence that Ms. Pracna had no obligation to pay the $25,000 premium, at least in the eyes of Ms. Trimble:

(a) Ms. Trimble did not complain about the non-payment of the premiums at the time that Mr. Heartfelt appeared on August 16, 1995, four days after he had been bonded out of jail. (TR. 629)

(b) When Ms. Trimble contacted Ms. Pracna about the return of the $7,500 check, she did not make demand for a check in the amount of $32,500. (TR. 569-570)

(c) The next demand that Ms. Trimble made for payment after she demanded payment of the $7,500 was for the sum of $50,000 to cover the full amount of one of the bonds in the event of forfeiture, rather than either $25,000 to cover the balance of the bond premium or $75,000 to cover both of the balances of the bond premium and the bond forfeiture. (TR. 569-570)

(d) The promissory note signed by Ms. Pracna on August 12, 1995 was for the sum of $325,000 rather than $350,000 which would have been the amount to cover both the balance of the bond premium and the amount of the bonds. (Ex. 7)

(e) The quit claim deeds did not authorize the recording of the deeds or sale of Ms. Pracna's property for non-payment of the $25,000 premium. (Exs. 8, 9 and 10)

(f) The bond contract obligated Mr. Heartfelt and Ms. Pracna to "pay the company the below mentioned sum as premium for said bond in advance or upon demand." (Ex. 1) Ms. Trimble acknowledges that no amount of the bond premium was stated on the bond contract and that instead the full amount of the bonds was indicated. (TR. 626-627)

(g) The amount of the bonds and the total bond premium shown on the reverse side of the bond contract was altered after the contract was signed on August 11, 1995 (the $250,000 bond was not issued until the following day), and the alterations on the form were not initialed or ratified by Ms. Pracna. (TR. 678, Ex 1)

At the very least, an issue of fact was left for the jury as to whether Ms. Pracna was responsible for the $25,000 bond premium.

This Court has made very clear that the determination of factual issues lies exclusively within the province of the jury. *See Glowacki v. Holste*, 295 S.W.2d 135, 139 (Mo. 1956); and *Richardson v. State Highway & Trans. Comm'n*, 863 S.W.2d 876, 880 (Mo. banc 1993). As recently as 2002, the Southern District held that fact intensive issues are best reserved for resolution by the jury. *Chrysler Fin. Co., LLC v. Flynn*, 88 S.W.3d 142, 150 (Mo. App. 2002).

The question before the jury here was whether the parties intended that Mr. Heartfelt have sole responsibility for payment of the premium. This intent is one of the issues that ordinarily is a matter for the trier of fact. *Edie v. Coleman*, 141 S.W.2d 238, 245 (Mo.

1940). Likewise, the issue of the parties' intent here should have been left to the jury for determination.

D. Jury Confusion

Before closing arguments began, trial court gave the jury written instructions, which included Instruction No. 9 relating to damages. That instruction is as follows:

Instruction No. 9

> **"Under the law, defendants Timmi Pracna and Treveillian Heartfelt are liable to plaintiff Karen Trimble for damages in this case. Therefore, you must find the issues in favor of plaintiff and award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damage you believe she sustained as a direct result of a breach of the bail bond contract mentioned in the evidence." (L.F. 307)**

Instruction No. 9 was patterned after M.A.I. 4.01 but was modified to inform the jury that liability had already been determined pursuant to Trimble I. The instruction clearly placed before the jury the entire issue of damages suffered by plaintiff as a result of plaintiff's breach of the bail bond contract. Nothing in the instruction told the jury that some of the damages had already been determined as a matter of law and that those damages were removed from its consideration.

Contrary to that instruction, the court told the jury: "It's for me to determine that amount of damages." (TR. 1645:12-13) Later, the court stated again in response to an objection by plaintiff's counsel: "The court has ruled as a matter of law that Ms. Pracna and Mr. Heartfelt are equally responsible under the bond contract for that." (TR. 1663:7-10)

Finally, in response to plaintiff's objection that Ms. Pracna's obligation had to be $25,000 higher to account for the bond premium, the trial judge told the jury: "The jury's instructed to that effect." (TR. 1683)

The statements of the trial judge about the obligation of Ms. Pracna to pay the bond premium amounted to an oral jury instruction. "A jury instruction is a direction given by the judge to the jury regarding the law of the case." *See Villines v. Meyer*, 58 S.W.3d 921, 924 (Mo.App. 2001). An instruction given to the jury by the court must be a correct statement of the law. *Spring v. Kansas City Area Transp. Auth.*, 873 S.W.2d 224, 226 (Mo. banc 1994). The trial court's oral instruction to the jury during closing argument must not misdirect and should not confuse the jury or be inconsistent with the written instructions, nor should the oral instruction be upon any issue in the case. *Martin v. Durham*, 933 S.W.2d 921, 924 (Mo.App. 1996). Moreover, instructions which intermingle inconsistent guides for recovery are prejudicially erroneous. *Hall v. Cooper*, 691 S.W.2d 507, 510 (Mo.App. 1985).

The trial judge's instruction to the jury regarding Ms. Pracna's liability for the $25,000 bond violated each of those principles and did constitute prejudicial error. In fact, in *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 22 (Mo. banc 1994), the court declared that the party responsible for error relating to argument of damages is charged with a rebuttable presumption that the error is prejudicial.

Instruction No. 9 told the jury that it was their job to determine the amount of damages sustained by plaintiff as a result of the breach of contract and, therefore, whether Ms. Pracna was obligated under the contract to pay the premium. In view of the testimony of both Ms. Trimble and Ms. Pracna, the person responsible to pay the $25,000 bond premium was fair

game for closing arguments. Instruction No. 9 expressly left that subject open for argument. It had to be confusing to the jury, who heard the testimony of both Ms. Trimble and Ms. Pracna that Mr. Heartfelt was solely responsible for payment of the $25,000 bond premium, to then hear the trial judge say that it was his responsibility to determine damages. That was especially true when the judge determined the issue in favor of Ms. Trimble as a matter of law.

The effect of the declaration of the trial court obviously undermined the credibility of counsel for Ms. Pracna before the jury. On four separate occasions, the jury was told that counsel for Ms. Pracna had violated the court's finding with respect to Ms. Pracna's obligation for the $25,000 bond premium. It is not surprising then that the jury returned a verdict for nearly 100% of the amount requested by plaintiff's counsel in oral argument. The confusion engendered by erroneous oral instruction of the trial court to the jury virtually ensured such a result.

E. Oral Jury Instruction

The use of oral instructions by a trial court is subject to the limitations set forth in Civil Rule 70.02(f) which states, in part:

> The final instructions of the law governing the case should be read to the jury by the court and provided to the jury in writing.

Defendant Pracna submits that the trial court's instructions to the jury during closing argument to the effect that Ms. Pracna did as a matter of law owe the $25,000 bond premium violated the requirements of that rule.

The trial court told the jury that Ms. Trimble was entitled to recover $25,000 in bond premium from Ms. Pracna as a matter of law. That amounted to a "jury instruction." *Villines*

v. Meyer, 55 S.W.3d 921, 924 (Mo.App. 2001). Defendant Pracna acknowledges that trial court rulings upon arguments of counsel typically do not constitute "instructions" which must be reduced to writing. *See O'Donnell v. St. Louis Pub. Serv. Co.,* 246 S.W.2d 539, 545 (Mo.App. 1952). Nonetheless, the facts of this case are much closer to those in *Mochar Sales Co. v. Meyer*, 373 S.W.2d 911 (Mo. 1963). In that case, after the written jury instructions were read to the jury, the trial court gave oral instructions regarding the computation of interest. The court found the oral instruction to be a prejudicial error because it violated the statute requiring the instructions to be in writing and it was incomplete and misleading:

> The statute requiring instructions to be in writing applies to instructions submitting issues to the jury. The allowance of interest was an issue in this case.
>
> The oral instruction not only violated the statutory requirement, it was also erroneous because it was incomplete and misleading.

Id. at 916 (citations omitted).

The only factual issue the jury in this case was to decide was what damage was sustained by the plaintiff as a result of breach of contract. The conclusion made by the trial court that Ms. Pracna was as a matter of law liable for the bond premium could have been included in Instruction No. 9. Since it was not, that issue was left open for oral argument by counsel for the parties. The trial court's oral instruction violated the limitation of the trial court's authority.

F. Prejudicial Effect

The prejudice resulting from the trial court's instructions to the jury regarding the liability of Ms. Pracna on the bond premium is obvious. That ruling was contrary to the

testimony of both the plaintiff and defendant Pracna. The jury was certainly confused about why it had heard that testimony (without objection) and why it was being asked to then determine damages if, in fact, those damages had already been determined by the court. On four separate occasions, the court interjected itself into closing argument of counsel for defendant Pracna to advise the jury that the argument was improper and should be disregarded. Plainly, the effect of those rulings was to diminish standing of defendant Pracna and her counsel in the eyes of the jury. That is exactly why this Court in *Tune*, *supra*, held such conduct by the trial judge presumptively prejudicial. The appropriate remedy for the error of the trial court is to order a new trial on the issue of damages on plaintiff's claim for breach of contract.

POINT II

The trial court abused its discretion in refusing to submit defendant's withdrawal instruction, Instruction No. B, because the withdrawal instruction would have eliminated the false issue of bounty hunter fees not actually paid or incurred by Trimble, in that there was no substantial evidence that plaintiff incurred or paid the bounty hunter fees described in Instruction No. B so those fees should have been withdrawn from the consideration of the jury.

A. Standard of Review

"Exclusion of testimony and giving withdrawal instructions are both matters within the discretion of the trial court." *Anglim v. Missouri P.R. Co*., 832 S.W.2d 298, 308 (Mo. banc 1992). "A withdrawal instruction is appropriate where the jury might infer from the evidence presented that inappropriate factors relating to damages were included." *State ex rel. Missouri Highway & Transp. Comm'n v. Wallach*, 826 S.W.2d 901, 903-04 (Mo.App. 1992) (emphasis added). "[T]he failure to give a proper withdrawal instruction where there is evidence which might raise a false issue is reversible error." *Womack v. Crescent Metals Prods., Inc.*, 539 S.W.2d 481, 484 (Mo.App. 1976) (emphasis added). The appellate court reviews de novo whether the evidence in a given case is substantial. *Kenny v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. banc 2003).

B. The Failure to Give Instruction No. B Constitutes Reversible Error Because, Throughout the Trial, Plaintiff Trimble Raised the False Issue of Damages in the Form of Bounty Hunter Fees

Throughout the trial of this matter, plaintiff Trimble claimed contract damages in the form of bounty hunter fees incurred in locating Mr. Heartfelt (TR.571). Trimble also requested damages in the form of bounty hunter fees and expenses as part of her fraud claim (Instruction No. 15). Ms. Trimble testified, however, that the bounty hunter fees and expenses incurred by Tony DeLaughter, U.S. Recovery, Catch & Retrieve, Todd Warf, and Dallas Montgomery were contingent expenses never actually paid by her because none of those bounty hunters captured Heartfelt (TR. 567, 571-572). Because Trimble paid no fees to any of the bounty hunters listed above and denied that she was obligated to pay them in court filings (Ex. 104A), it is only logical that she should not be entitled to recover damages based on expenses neither expended or incurred; and which, in any event, are now barred by the statute of limitations (Section 516.120 RSMo. 2002). Accordingly, defendant Pracna's counsel requested this false issue of damages be removed from the jury's consideration through the use of Instruction B (A. 016), which states:

Instruction No. B

The following evidence is withdrawn from the contract claim, Verdict A, and you are not to consider such evidence in arriving at your verdict:

Any bounty hunter fees claimed by:

(a) Tony DeLaughter;

(b) U.S. Recovery;

(c) Catch & Retrieve;

(d) Todd Warf; or

(e) Dallas Montgomery.

The court refused Pracna's withdrawal instruction (TR. 1567:4-7; 12-13).

The trial court abused its discretion in refusing to submit this proffered withdrawal instruction. Instruction No. B would have made clear to the jury that damages alleged in connection with bounty hunters Tony DeLaughter, U.S. Recovery, Catch & Retrieve, Todd Warf, and Dallas Montgomery were not recoverable and should not be considered. Because the trial court refused Instruction No. B, the jury received no guidance on the issue of whether the bounty hunter fees detailed above could be calculated into Trimble's breach of contract damages. Even worse, Trimble actually recovered damages based on the bounty hunter fees, thereby giving a windfall to plaintiff.

Because the trial court permitted the false issue of the bounty hunter fees to be injected into the case and to remain in the case without a withdrawal instruction, all while allowing Trimble to improperly request damages on the above fees, reversal on the judgment for damages on the breach of contract is required.

POINT III

The trial court erred in failing to sustain defendant Pracna's Motion for Judgment Notwithstanding the Verdict (JNOV) because plaintiff failed to prove each essential element of her claim for fraud by substantial evidence, and in particular, the necessary elements that she reasonably relied upon the statements of Ms. Pracna mentioned in the verdict directing instructions (Instruction Nos. 13-17) in either writing the bonds or hiring bounty hunters, that such statements were material to her decision to either write the bonds or hire the bounty hunters, or that she was damaged as a result of any representations of Ms. Pracna set out in the verdict directors, in that:

(a) Plaintiff wrote the bonds based on the collateral and the "perfect" credit rating of Ms. Pracna, notwithstanding plaintiff's belief that Mr. Heartfelt would run on the bonds after they were written and knowing that he may have used several aliases;

(b) Plaintiff knew that Ms. Pracna was already obligated under the bond contract to pay all costs of recapture at the time any bounty hunters were hired and when Ms. Pracna made statements about the bounty hunters; and

(c) Plaintiff's sole claim for actual damages was for her lost income while searching for Mr. Heartfelt, but she failed to prove such damages because her bail bond business was a sole proprietorship and the business had no history of profits either before or after Mr. Heartfelt absconded.

A. Standard for Review

The standard for review for the denial of a motion for judgment (JNOV) is set out in *Giddens v. Kansas City S. Ry. Co.*, 29 S.W.3d 813, 818 (Mo. banc 2000) (citations omitted):

> The standard of review of denial of a JNOV is essentially the same as for review of denial of a motion for directed verdict. A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. In its determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences in disregarding evidence and inferences that conflict with that verdict. This court will reverse the jury's verdict for insufficient evidence only where there is a complete absence of probative fact to support the jury's conclusion.

B. Alleged Misrepresentations

Plaintiff's claim for fraud was submitted to the jury in verdict directing Instruction Nos. 13 through 17 which alleged that defendant Pracna made the following statements:

1. The only nickname or alias of Treveillian Heartfelt was "Chance";
2. Defendant Pracna had an income in excess of $100,000;
3. After Mr. Heartfelt absconded, Ms. Pracna said that she would pay for all the bounty hunter fees and expenses prior to Ms. Trimble agreeing to pay those fees and expenses;
4. Mr. Heartfelt had always appeared for his court appearances in the past; and

5. Mr. Heartfelt was not in violation of his parole by being in Missouri.

Pursuant to Civil Rule 84.04(e), Defendant Pracna sets forth each of those instructions verbatim in the conclusion of this Point.

Irrespective of whether those statements by Ms. Pracna were true, plaintiff has failed to establish that she either reasonably relied upon each of the statements, that each of the statements were material to her in deciding to write the bonds, or that she was damaged as a result of each statement.

C. Materiality and Reliance

The requirement that the plaintiff in a claim for fraud and misrepresentation prove materiality and reliance is well established. *See State ex rel. PaineWebber, Inc. v. Voorhees*, 891 S.W.2d 126 (Mo. banc 1995). A further exploration of both elements reveals the flaws in plaintiff's case.

In *Empire Gas Corp. v. Small's LP Gas Co.*, 637 S.W.2d 239 (Mo.App. 1982), the defendant claimed that it had received fewer propane tanks than the plaintiff had represented would be sold to the defendant. The court recognized that, where both parties were aware of the uncertainty of the given fact, neither could claim to rely upon the other:

> Where there is a mutual recognition of the uncertainty of a given fact, it cannot be said that either party relied on or had a right to rely upon that fact. Reliance upon representations is an essential element in an action for fraud and absent that element no cause of action for cause exists.

Id. at 243.

The effect of a party's investigation on its ability to establish an action for fraud was considered in *Misskelly v. Rogers*, 721 S.W.2d 170 (Mo.App. 1986). The court found that the plaintiff could not have relied upon the representations of the defendant with respect to the price the defendant had paid for real estate where plaintiff had inspected the property to determine if it was worth the asking price:

> In Missouri, when a party undertakes his own investigation, he is not allowed to rely on misrepresentations of another and is presumed to be guided by his own conclusions and judgments.

Id. at 173.

Regardless whether or not a party seeking to recover in fraud has undertaken an investigation, if that party has equivalent knowledge to the party making the representation about the fact at issue, there can generally be no recovery. That principle was discussed in *Consumers Coop. Ass'n. v. McMahan*, 393 S.W.2d 552, 556 (Mo. 1965), which stated:

> Where the parties are on an equal footing and the means of knowledge is equally available to both parties, a misrepresentation or erroneous statement of fact is not actionable.

The requirement of reliance is further refined by the requirement that the representation be material. In other words, not only must the recipient of the representation have reasonably relied upon the representation, but it must have caused the recipient to act. *Best v. Culhane*, 677 S.W.2d 390, 394 (Mo.App. 1984). It is not enough that the statement was subjectively material to the recipient of the representation. Instead, the test for materiality is objective and depends upon the circumstances surrounding the transaction. The representation must directly

relate to the matter in controversy and be of such a nature that the recipient would not have acted if there had been no representation or he was aware that the representation was false:

> [A] representation is material if it relates directly to the matter in controversy and is of such a nature that the ultimate result would not have followed if there had been no representation, or if the one who acted upon it had been aware of its falsity.

Carnahan v. American Family Mut. Ins. Co., 723 S.W.2d 612, 615 (Mo.App. 1987).

The testimony of Ms. Trimble clearly establishes that each of the representations set forth in Instruction Nos. 13 through 17 were not relied upon by her nor did each one cause her to act to either write the bonds or hire bounty hunters.

Ms. Trimble has admitted that at the time she decided to write these bonds, she was aware of each of the following facts:

1. She had been told by the prosecuting attorney that Mr. Heartfelt had numerous aliases and a long criminal history. (TR. 76, 661, 1307-1308)
2. Mr. Heartfelt had a prior felony conviction and was on parole for that conviction. (TR. 661, Ex. 1)
3. Mr. Heartfelt's name, social security number and date of birth did not check out on the credit check. (TR. 661)
4. Mr. Heartfelt was accused of stealing a car and being a fugitive from justice. (TR. 661, 1312-1313, Ex. 190,191)
5. Mr. Heartfelt was accused of lying or deceit in passing a bad check. (TR. 661, Ex. 11)

6. Mr. Heartfelt was accused of jumping his parole in the State of Idaho in violation of the terms of his parole. (TR. 1314, Ex. 191)

7. She believed that Mr. Heartfelt would run on the bonds if they were written. (TR

None of those facts dissuaded Ms. Trimble from writing the bonds for Mr. Heartfelt. Ms. Trimble made it clear why she had written these bonds in spite of all that information. She wrote the bonds simply because she believed she had ample security and because the credit rating of Ms. Pracna was "perfect":

"Q. Well, the major fact, as we discussed last time, was her collateral and her credit rating. That's what you really based your decision on?

A. That's correct.

Q. And since her credit rating was good and the collateral was real, you thought valuable, and it was valuable, that met the criteria, right?

A. That would be a major factor, too." (TR. 652)

****

"Q. Right. And you wrote this bond because of the collateral that Ms. Pracna had offered you and the credit report that you received on her, isn't that true?

A. Yes." (TR. 555-556)

The testimony of the prosecuting attorney, Dianna Long, confirmed the true reason why Ms. Trimble wrote the bonds:

"Q. How many times did you tell Ms. Trimble don't bail this guy out?

A. Probably the same because a lot of time the three of us were talking together, and I just kept saying, you know he's going to flee. I knew he was going to flee, and I told them that over and over.

Q. And her response was that she had lots of property and collateral?

A. She was covered." (TR. 1330)

****

"Q. Okay. Now, what did Ms. Trimble say when you told her this guy's got a long criminal history, he's got a long list of aliases, what did she say?

A. She said she was fully secured on the bond, and that the lady who was putting up the security was with her, was at the jail and she had the titles of the deeds in escrow already. This was secured and there was no problem with that." (TR. 1308)

The only relevance of the alleged misrepresentation about the aliases, the prior bond experience, the parole violation, and Ms. Pracna's income on Ms. Trimble's decision to write the bonds was whether or not Mr. Heartfelt would run on the bonds. Regardless of what assurances Ms. Pracna had given, Ms. Trimble already thought he would run!! Therefore, either Ms. Trimble did not believe Ms. Pracna or the alleged representations did not matter in deciding to write the bonds.

The same is true of the claim that Ms. Trimble relied upon the statements of Ms. Pracna in hiring bounty hunters. The fact is that the bond contract signed by Ms. Pracna required her to pay recapture costs (Ex. 1). Whether Ms. Pracna did or did not agree with the hiring of bounty hunters made no difference in the decision of Ms. Trimble to hire the bounty hunters.

That fact is made obvious by the fact that Ms. Trimble has not paid any fees to any bounty hunters, nor is she obligated to do so by her own testimony. (TR. 579, 803) Those fees were in fact a part of Ms. Trimble's claim for damages for breach of contract and she recovered fully for them on that claim.

D. Damages

The trial court instructed the jury that it could not assess any damages on Trimble's fraud claim that it had already assessed on Trimble's contract claim. *See* Instruction No. 18 The appellate court is to presume that the jury follows the instructions given by the trial court. *Trimble v. Pracna*, 51 S.W.3d at 497. If the jury did not follow the instruction, it improperly awarded double recovery for the same element of damages, and Pracna is entitled to a new trial. *Meco Sys. v. Dancing Bear Entm't*, 42 S.W.3d 794, 810-11 (Mo. App. 2001). Assuming that the jury did follow the court's instruction, Trimble failed to establish a submissible fraud claim because she proved no damages to support that claim. Trimble is not entitled to damages for the time she spent searching for Mr. Heartfelt. Therefore, Trimble failed to prove any damages, distinct from the contract damages, flowing from the alleged fraudulent misrepresentation.

Damages are an essential element of a claim for fraudulent misrepresentation. *State ex rel. PaineWebber, Inc. v Voorhees*, 891 S.W.2d 126, 128 (Mo. banc 1995). *O'Conner v. Follman*, 747 S.W.2d 216 (Mo. App. 1988), is instructive. In that case, an unlicensed sales and leasing associate brought a fraud action to recover unpaid commissions. The only actual damages either pleaded or proven by the plaintiff were the lost commissions. *Id*. at 220. Defendants argued that plaintiff failed to establish legally collectible damages because as an

unlicensed real estate agent the plaintiff could not recover commissions on any theory under Missouri law. The court of appeals agreed. It reversed the verdict in favor of the plaintiff on the grounds that she did not prove any damages to support her claim. *Id*. at 220-22.

Plaintiff's sole claim for damages arising from the alleged fraud was for the time that she spent searching for Mr. Heartfelt. (TR. 1630) Apparently, this claim arises from the assertion that either A-Advanced Bail Bonds lost profit (TR. 639) or that Ms. Trimble should be compensated for her lost time in searching for Mr. Heartfelt. (TR. 721) Ms. Trimble failed to prove, however, that she had either lost income or lost profits to support her claim.

A-Advanced Bail Bonds was a very new company at the time the bonds were written for Mr. Heartfelt in August 1995. The company had been licensed in December 1994 by the State of Missouri to operate as a bail bond company. (TR. 15, 17) Plainly, plaintiff produced no evidence that would justify recovery of lost profits. In fact, the only evidence presented to the jury showed that A-Advanced Bail Bonds never earned a profit either prior to, during, or after the capture of Mr. Heartfelt. (Exs. 163, 164, 167, 168 and 502) Proof of a history of profits is generally necessary to recover lost profits. *See Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968) (loss from interruption of business is recoverable only after proof of income and expenses and a resulting profit during the previous period) and *Wisch & Vaughan Constr. Co. v. Melrose Properties Corp.*, 21 S.W.3d 36, 42 (Mo.App. 2000) (plaintiff must produce evidence which provides an adequate basis for estimating lost profits with reasonable certainty). Ms. Trimble acknowledged any money she received from the company was derived from profits that it earned. (TR. 622) She admitted it was not possible for her to base her claim for lost time on any claim for lost profits. (TR. 623)

Plaintiff's claim for "lost time" is simply not compensable because it does not translate either into lost wages or lost profits. Ms. Trimble's claim is similar to the claim in *Seymour v. House*, 305 S.W.2d 1 (Mo. 1957). The plaintiff there was injured in an automobile accident and attempted to recover for his losses resulting from his inability to work in his sole proprietorship. The plaintiff alleged that since he was unable to work, he had to find someone else to perform labor that he would have been able to do himself. As in this case, the plaintiff had not paid himself a salary before the injury occurred and he depended upon profits from the company for his earnings. The Supreme Court found that plaintiff's claim for damages was speculative and it was reversible error for the court to submit an instruction allowing the plaintiff to recover for past or future damages absent substantial supporting evidence:

> It is clearly prejudicial to allow the jury to speculate upon supposed lost earnings, last or future, without substantial evidence upon which it might intelligently base an estimate.

Id. at 7.

Plaintiff apparently recognized the problem of claiming damages for fraud when those same damages were consumed by the claim for breach of contract. She admitted there was no difference between her claim of damages for breach of contract and her claim for damages on her claim for fraud. (TR. 660) Consequently, plaintiff attempted to fashion her claim for lost time as a damage not compensable under her claim for breach of contract. (TR. 721) That attempt failed. After all, plaintiff admitted that she had never charged anyone else $400 a day for looking for an escaped bail jumper, and this is the one and only time she had ever charged $400 a day for her services. (TR. 622) Plaintiff's claim for damages cannot stand upon such

a frail foundation.

The award of punitive damages on the fraud claim fails for the same reason. It is well established in Missouri that no punitive damages can be awarded absent an award of actual or nominal damages. *Compton v. Williams Bros. Pipeline Co.*, 499 S.W.2d 795, 797 (Mo. 1973); *Cooper v. Bluff City Mobile Home Sales, Inc.*, 78 S.W.3d 157, 168 (Mo. App. 2002). Because actual damages are a necessary element of a cause of action for fraudulent misrepresentation, nominal damages are not sufficient to support a punitive damages award. *Williams v. Williams*, 99 S.W.3d 552, 556-57 (Mo.App. 2003); *MLJ Invs., Inc. v. Reid*, 905 S.W.2d 900, 901-02 (Mo.App. 1995).

E. Conclusion

Plaintiff failed to establish any substantial evidence to support a verdict that any of the alleged misrepresentations set out in Instruction Nos. 13 through 17 were either material or reasonably relied upon by Ms. Trimble. Moreover, she has completely failed to prove any damage arising from those alleged misrepresentations. Consequently, the trial court erred in failing to sustain defendant Pracna's motion for JNOV on plaintiff's claim for fraud and for punitive damages and judgment should be entered in favor of defendant Pracna on those claims.

F. Text of Instruction Nos. 13 through 17 Pursuant to Civil Rule 84.04(e)

Instruction No. 13

Your verdict must be for plaintiff if you believe:

First, defendant Timmy Pracna stated that the only nickname or alias for Treveillian Heartfelt was "Chance," intending that plaintiff rely upon such representation in posting the bail bond to get Treveillian Heartfelt released from jail,

and

Second, the representation was false, and

Third, defendant knew that it was false, and

Fourth, the representation was material to the decision of plaintiff to post the bail bond to get Treveillian Heartfelt released from jail, and

Fifth, plaintiff relied on the representation in making the decision to post the bail bond to get Treveillian Heartfelt released from jail, and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation, and

Sixth, as a direct result of such representation the plaintiff was damaged.

****

Instruction No. 14

Your verdict must be for plaintiff if you believe:

First, defendant Timmi Pracna stated that she had income in excess of $100,000.00, intending that plaintiff rely upon such representation in posting the bail bond to get Treveillian Heartfelt released from jail, and

Second, the representation was false, and

Third, defendant knew that it was false, and

Fourth, the representation was material to the decision of plaintiff to post the bail bond to get Treveillian Heartfelt released from jail, and

Fifth, plaintiff relied on the representation in making the decision to post the bail bond to get Treveillian Heartfelt released from jail, and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation, and

Sixth, as a direct result of such representation the plaintiff was damaged.

****

Instruction No. 15

Your verdict must be for plaintiff if you believe:

First, defendant Timmi Pracna stated that Timmi Pracna would pay all of the bounty hunter fees and expenses prior to Karen Trimble agreeing to pay those fees and expenses, intending that plaintiff rely upon such representation in agreeing to expend and expending funds for bounty hunter fees and expenses, and

Second, the representation was false, and

Third, defendant knew that it was false at the time of the representation was made, and

Fourth, the representation was material to the decision of plaintiff to expend and expending funds for bounty hunter fees and expenses, and

Fifth, plaintiff relied on the representation in making the decision to expend and expending funds for bounty hunter fees and expenses, and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation, and

Sixth, as a direct result of such representation the plaintiff was damaged.

****

Instruction No. 16

Your verdict must be for plaintiff if you believe:

First, defendant Timmi Pracna stated that Treveillian Heartfelt had always appeared for his court appearances in the past, intending that plaintiff rely upon such

representation in posting the bail bond to get Treveillian Heartfelt released from jail, and

Second, the representation was false, and

Third, defendant knew that it was false, and

Fourth, the representation was material to the decision of plaintiff to post the bail bond to get Treveillian Heartfelt released from jail, and

Fifth, plaintiff relied on the representation in making the decision to post the bail bond to get Treveillian Heartfelt released from jail, and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation, and

Sixth, as a direct result of such representation the plaintiff was damaged.

****

Instruction No. 17

Your verdict must be for plaintiff if you believe:

First, defendant Timmi Pracna stated that Treveillian Heartfelt was not in violation of his parole by being in Missouri, intending that plaintiff rely upon such representation in posting the bail bond to get Treveillian Heartfelt released from jail, and

Second, the representation was false, and

Third, defendant knew that it was false, and

Fourth, the representation was material to the decision of plaintiff to post the bail bond to get Treveillian Heartfelt released from jail, and

Fifth, plaintiff relied on the representation in making the decision to expend to

post the bail bond to get Treveillian Heartfelt released from jail, and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation, and

Sixth, as a direct result of such representation the plaintiff was damaged.

POINT IV

The trial court erred in submitting Instruction No. 13, because the instruction was not supported by substantial evidence and it confused, misled and misdirected the jury, in that there was indisputable evidence that plaintiff knew that Mr. Heartfelt may have used aliases and that fact was not relied upon nor was it material to plaintiff when she wrote the bail bonds for him.

A. Standard for Review

A jury instruction must be supported by substantial evidence which, if true, is probative and permits the jury to reasonably decide the case. *See Stotler v. Bollinger*, 501 S.W.2d 558, 560 (Mo.App. 1973) and *Johnson v. Bush*, 418 S.W.2d 601, 606 (Mo.App. 1967). In order to reverse a verdict based on an instructional error, the party seeking reversal must show (i) the offending instruction misdirected, misled or confused the jury, and (ii) prejudice resulted from the error. *Holder v. Schenherr*, 55 S.W.3d 505, 507 (Mo.App. 2001). The appellate court reviews de novo whether the evidence in a case is substantial and supports an instruction. *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. banc 2003).

B. Jury Instruction No. 13

Instruction No. 13 reads as follows:

Your verdict must be for plaintiff if you believe:

First, defendant Timmy Pracna stated that the only nickname or alias for Treveillian Heartfelt was "Chance," intending that plaintiff rely upon such representation in posting the bail bond to get Treveillian Heartfelt released from jail, and

Second, the representation was false, and

Third, defendant knew that it was false, and

Fourth, the representation was material to the decision of plaintiff to post the bail bond to get Treveillian Heartfelt released from jail, and

Fifth, plaintiff relied on the representation in making the decision to post the bail bond to get Treveillian Heartfelt released from jail, and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation, and

Sixth, as a direct result of such representation the plaintiff was damaged.

C. Information Available To Plaintiff

The application used by A-Advanced Bail Bonds asked whether or not the accused had a nickname or alias. (Ex. 1) In response to that question, Ms. Pracna underlined the word nickname and inserted the name "Chance." (TR. 40-41, Ex. 1) Plaintiff complains that this disclosure was inadequate because, although there is no dispute that Mr. Heartfelt's nickname was "Chance," Mr. Heartfelt was known by other aliases and those aliases had not been disclosed to plaintiff by Ms. Pracna. The evidence is clear, however, that Ms. Trimble did know that Mr. Heartfelt had been known by other aliases, in fact a long list of aliases, but nonetheless, chose to write the bond.

The process of writing the bonds for Mr. Heartfelt took place over two days. During the afternoon of the first day, it came to the attention of Dianna Long (the assistant prosecutor) that someone was attempting to bail out Mr. Heartfelt. Ms. Long was concerned about that because she felt that Mr. Heartfelt was a definite flight risk. (TR. 554, 1307, 1309) Ms. Long immediately went to the Taney County jail to find out who was about to bond out Mr. Heartfelt.

There she met both Ms. Trimble and Ms. Pracna and warned them that Mr. Heartfelt should not be bailed out. (TR. 1307-1308) Ms. Long informed Ms. Trimble that Mr. Heartfelt had a long criminal history and had a long list of aliases. (TR. 308) She told Ms. Trimble that she believed Mr. Heartfelt would never return if he was bailed out of jail. (TR. 1307) She also told Ms. Trimble that she had in her hands the court files which were available for the inspection of Ms. Trimble and which showed the criminal activity that led to charges against Mr. Heartfelt. Those charges included fleeing from justice in the State of Nevada and theft in the State of Missouri. (Exs. 11, 190, 191 and 192) Ms. Trimble declined to look at the files offered to her by Ms. Long, but acknowledges had she looked at the file, she would have noted that Mr. Heartfelt was charged under at least three separate aliases. (TR. 657, 1307-1308) Ms. Trimble's response to Ms. Long's warnings were two- fold—she believed that Mr. Heartfelt would run on the bond, and she believed that she had ample security to protect the bonds. (TR. 657-658, 1308)

The disclosures by Ms. Long to Ms. Trimble regarding Mr. Heartfelt's use of aliases gave Ms. Trimble the precise information regarding aliases that she now claims was so important. Ms. Trimble claims that had she known about the list of aliases used by Mr. Heartfelt she never would have written the bond because that might indicate that Mr. Heartfelt would run. (TR. 47-449) At least, she says that if she knew of more than one alias, she would not have written the bond. (TR. 447-448) Yet, somehow she claims that her memory of what Ms. Long had told her before deciding to write the bonds was blotted out by statements by Ms. Pracna in that Ms. Pracna disagreed with the prosecutor's contention that Mr. Heartfelt had used aliases. In other words, Ms. Trimble completely discounted the word of the prosecuting

attorney who had charged Mr. Heartfelt with this crime weeks before, and who was armed with information provided by law enforcement concerning the background of Mr. Heartfelt. Rather, she favored the statements from a lady from Idaho whom she had met only hours before and who was attempting to bail out a gentleman who: 1) had been in prison only six months before on charges of forgery and theft, 2) who was under indictment for stealing and fleeing from the State of Nevada, and 3) who was alleged to have broken the terms of his parole and fleeing from the State of Idaho. Does that seem possible, let alone reasonable? At the time that Ms. Trimble wrote these bonds, she had been writing bail bonds for six years and she was responsible for her own bail bond company.

This defendant does not contend that Ms. Trimble foolishly entered into the bail bonds. Rather, Ms. Trimble entered into the bail bonds for the exact reasons that she enters into any bail bond—ample security and a sufficient bond premium. Having secured those items, Ms. Trimble felt confident in proceeding with the bonds even though she believed at the time the bonds were written that Mr. Heartfelt would run on the bonds. (TR. 657-658)

This defendant is mindful of the law in Missouri to the effect that even when parties have equal knowledge about a fact, the party receiving the representation still has the right to rely upon a distinct and specific representation made for the purpose of inducing that party to act. *Premium Fin. Specialists, Inc. v. Hullin*, 90 S.W.3d 110, 115 (Mo.App. 2002) (rule prohibiting recovery where parties stand on equal footing does not apply where a party makes a distinct and specific representation to induce the other party to act). Nonetheless, the recipient of the representation must still prove that they did in fact rely upon the representation. In *Keefhaver v. Kimbrell*, 58 S.W.3d 54 (Mo.App. 2001), the court found that

the sophistication of the party receiving the representation was one fact to be considered:

> A person is entitled to rely on a representation where:
>
> (i) She lacks equal facilities for learning the truth;
>
> (ii) Where the facts are peculiarly within the knowledge of the speaker and difficult for the hearer to ascertain;
>
> (iii) Where the representation relates to latent defects;
>
> (iv) Where it would be necessary to a third person to make an examination in order to discover the truth because of the hearer's ignorance and inexperience; and
>
> (v) Where the employment of an expert would be required.

All that being true, the fact remains that Ms. Trimble simply did not find the representations to be material or rely upon those representations in making her decision to write the bonds. She has testified that she would be concerned about someone with aliases because they might be more prone to run on the bond. (TR. 449) Consequently, she would have been reluctant to write the bond because Mr. Heartfelt might run. However, Ms. Trimble stated very clearly to the jury that she thought Mr. Heartfelt would run on the bond before she wrote them. (TR. 657-658) By her testimony, she has established that she placed no reliance upon the representation she claims was made by Ms. Pracna regarding aliases and did not find that information material to her decision on whether to write the bonds. She simply wrote the bonds because she thought she was protected by the collateral received by Ms. Pracna and she was satisfied with the premium being paid.

The question of whether sufficient evidence existed to submit Instruction No. 13 to the

jury was a legal question for the court. *McCrackin v. Plummber*, 103 S.W.3d 178, 181 (Mo.App. 2003). Submitting an instruction which lacks substantial evidence to support the issue tendered in the instruction constitutes reversible error. *Hepler v. Caruthersville Supermarket Co.*, 102 S.W.3d 564, 568 (Mo.App. 2003). Inasmuch as Instruction No. 13 lacked any substantial evidence and should not have been submitted to the jury, the verdict in favor of plaintiff Trimble on the claim for fraud and punitive damages should be set aside and judgment entered in favor of Ms. Pracna on that claim.

POINT V

The trial court erred in submitting Instruction No. 15, because there was no substantial evidence supporting essential elements of Trimble's claim of fraudulent misrepresentations relating to payment of bounty hunter fees, in that: (a) Trimble did not claim or establish any damages for these alleged fraudulent misrepresentations that were distinct from the damages she claimed for breach of contract, and (b) there was no substantial evidence supporting the requisite elements of falsity, materiality, reliance, and damages.

A. Standard of Review

"Instructional error must be prejudicial to a party to warrant reversal." *Hepler v. Caruthersville Supermarket Co.*, 102 S.W.3d 564, 568 (Mo.App. 2003). The issue of prejudice in the giving of an instruction is reviewed de novo. *Id.* "Reversal is required where an instruction misdirected, misled or confused a jury, or where the merits of the case were affected by the submission of the flawed instruction." *Id.*

Further, "a case should not be submitted to the jury unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. 2003) (citation omitted). Submitting an instruction despite the lack of substantial evidence supporting it constitutes reversible error. *Hepler*, 102 S.W.3d at 568. The issue of whether substantial evidence supported the instruction given is reviewed de novo. *Kenney*, 100 S.W.3d at 814.

B. The Language of Instruction No. 15

Instruction No. 15 involves fraudulent misrepresentation regarding bounty hunter fees and expenses and reads as follows:

Instruction No. 15

Your verdict must be for plaintiff if you believe:

First, defendant Timmi Pracna stated that Timmi Pracna would pay all of the bounty hunter fees and expenses prior to Karen Trimble agreeing to pay those fees and expenses, intending that plaintiff rely upon such representation in agreeing to expend and expending funds for bounty hunter fees and expenses, and

Second, the representation was false, and

Third, defendant knew that it was false at the time the representation was made, and

Fourth, the representation was material to the decision of plaintiff to expend and expending funds for bounty hunter fees and expenses, and

Fifth, plaintiff relied on the representation in making the decision to expend and expending funds for bounty hunter fees and expenses, and in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation, and

Sixth, as a direct result of such representation the plaintiff was damaged.

C. Instruction No. 15 Was Not Supported by Proof of Any Damages Separate and Distinct from the Damages Sought Under Instruction No. 9

Instruction No. 18 instructed the jury that it could not assess any damages on Trimble's

fraud claim that it had already assessed on Trimble's contract claim. The appellate court is entitled to presume that the jury follows the instructions given by the trial court. *Trimble v. Pracna*, 51 S.W.3d at 497. If the jury did not follow the instruction, it improperly awarded double recovery for the same element of damages, and Pracna is entitled to a new trial. *Meco Sys. v. Dancing Bear Entertainment*, 42 S.W.3d 794, 810-11 (Mo. App. S. D. 2001). Assuming (as we should) that the jury did follow the court's instruction, Trimble failed to establish a submissible fraud claim under Instruction No. 15 because she proved no damages to support her claim separate and distinct from damages claimed under Instruction No. 9 (breach of contract). Absent evidence of separate, distinct damages under Instruction No. 15, the giving of Instruction No. 15 was reversible error. *See Brown v. St. Louis Pub. Serv. Co.*, 421 S.W.2d 255, 259 (Mo. banc 1967) ("[I]t is prejudicial error to instruct a jury on damages for injuries of which there is no evidence."); *Hibbs v. Jeep Corp.*, 666 S.W.2d 792, 797 (Mo. App. 1984); *Hughey v. Graham*, 604 S.W.2d 626, 631 (Mo.App. 1980).

Damages are an essential element of a claim for fraudulent misrepresentation. *State ex rel. PaineWebber, Inc. v Voorhees*, 891 S.W.2d 126, 128 (Mo. banc 1995). *O'Conner v. Follman*, 747 S.W.2d 216 (Mo. App. 1988), is instructive. In that case, an unlicensed sales and leasing associate brought a fraud action to recover unpaid commissions. The only actual damages either pleaded or proven by the plaintiff were the lost commissions. *Id*. at 220. Defendants argued that plaintiff failed to establish legally collectible damages because as an unlicensed real estate agent the plaintiff could not recover commissions on any theory under Missouri law. The court of appeals agreed. It reversed the verdict in favor of the plaintiff on the grounds that she did not prove any damages to support her claim. *Id*. at 220-22.

It is apparent that plaintiff could not and did not establish any damages to support her fraud claim in Instruction No. 15, because the bounty hunter fees claimed as damages under Instruction No. 15 were also claimed and were clearly recoverable under the breach of contract claim in Instruction No. 9. The bond contract obligated Ms. Pracna to pay for "returning prisoner costs" and "any expense in locating Defendant and producing him in Court" (Plaintiff Ex. 1). Plaintiff has repeatedly alleged the right to recover bounty hunter fees under her claim for breach of contract (Exs. 127 and 127A). Having claimed and recovered bounty hunter fees under Instruction No. 9 (breach of contract claim), plaintiff could not recover those same, indistinct damages under Instruction No. 15 (fraud claim).

D. Plaintiff Trimble Did Not Present Substantial Evidence of Falsity, Materiality, Reliance, and Damages

The essential elements of a fraudulent misrepresentation claim are a representation, its falsity, its materiality, the speaker's knowledge of its falsity, his intent that it be acted on by the hearer and in the manner reasonably contemplated, the hearer's ignorance of its falsity, his reliance on its truth, his right to rely, and damages. *Joel Bianco Kawasaki Plus, Inc. v. Meramec Valley Bank*, 81 S.W.3d 528, 536 (Mo. banc 2002).

Plaintiff Trimble did not present substantial evidence that defendant Pracna made a false statement when she promised to pay bounty hunter fees and expenses. In fact, when the jury permitted plaintiff to recover for the bounty hunter fees and expenses on her contract claim, the representation was proven true! The $58,400 paid by Ms. Pracna did, in fact, cover the bounty hunter fees and expenses paid by Ms. Trimble. (TR. 620)

"The falsity of the representation must be determined as of the time it was made and as of the time it was intended to be and was relied on." *Joel Bianco*, 81 S.W.3d at 538 (quotation omitted). Here, plaintiff Trimble presented no evidence that defendant Pracna's representation that she would pay bounty hunter fees and expenses was false at the time it was made. This case is like *Professional Laundry Management Systems, Inc. v. Aquatic Technologies, Inc.*, 109 S.W.3d 200 (Mo.App. 2003), where the court held that plaintiff failed to produce sufficient evidence of a false representation. The court noted:

> While there is more than sufficient evidence to show failure to perform, we note that failure to perform alone is not sufficient to establish the intent of the promisor at the time the agreement was made.

Id. at 206.

Here, plaintiff Trimble did not even show that Pracna failed to pay bounty hunter fees and expenses incurred by Trimble, let alone that Pracna had no intention of paying when she made the promise to pay. Even the contrary is true—when plaintiff Trimble requested $1,000 from defendant Pracna to pay for a bounty hunter (Garrison), the money was wired by defendant Pracna the next day! (TR. 207, Ex. 4A) Substantial evidence of falsity was not produced.

Likewise, Trimble failed to produce substantial evidence that any representation about bounty hunter fees was material or was relied upon by her. In the bond contract, upon which Trimble's breach of contract claim was based, Pracna promised to pay bounty hunter fees incurred by Trimble:

> To indemnify the Company against all liability, loss, damages, attorney fees and

> expenses whatsoever, including, but not limited to returning prisoner costs, which the Company may sustain or incur in making such bond, prosecuting or defending any action brought in connection therewith, and enforcing any of the agreements herein contained, and specifically in enforcing any collateral or indemnifying agreement as well as any expense in locating Defendant and producing him in Court . . . . (L.F. 254, Ex. 1)

Plaintiff Trimble produced no evidence that any verbal representation Pracna made to her about her willingness to pay bounty hunter fees and expenses was material to Trimble, and relied upon by her, in making her decision to incur bounty hunter fees and expenses. Plaintiff Trimble had a written contract in which Ms. Pracna agreed to pay the bounty hunter fees and expenses. Plaintiff testified to this effect and submitted claimed bounty hunter fees and expenses as part of her contract claim (TR. 571). There was no evidence that Trimble relied on any promise by Ms. Pracna separate and apart from the written contract, or that Ms. Trimble considered any separate representation material to her decision to incur bounty hunter fees and expenses.

Further, there was no evidence that Ms. Trimble was damaged by any representation about bounty hunter fees and expenses because the evidence at trial was that all bounty hunter fees incurred by Ms. Trimble were incurred on a <u>contingent basis and were never actually paid by her</u> (TR. 567, 571-572). The amount paid by Ms. Pracna to Ms. Trimble more than covered bounty hunter fees and expenses actually incurred and paid by Trimble (TR. 620). All of the expenses for which she sought recovery at trial were contingent fees which were never earned and never paid by her. Again, plaintiff sought <u>and</u> <u>recovered</u> a windfall. Further, there is

possibility that Ms. Trimble will never be deemed liable for the contingent bounty hunter fees expenses because the statute of limitations has expired on those claims. (Section 516.120 RSMo. 2000)

Instruction No. 15 prejudiced defendant Pracna because it was improperly submitted to the jury despite the fact that Ms. Trimble claimed and proved no damages for any alleged fraudulent misrepresentations that were distinct from damages she claimed under Instruction No. 9 for breach of the bail bond contract and despite the fact that no substantial evidence was presented to the jury on the requisite fraud elements of falsity, materiality, reliance, and damages. Ms. Pracna was prejudiced by the verdict against her and, therefore, the judgment should be reversed both on the fraud claim and on the claim for punitive damages. Punitive damages cannot be awarded absent an award of actual or nominal damages. *Compton v. Williams Bros. Pipeline Co.*, 499 S.W.2d 795, 797 (Mo. 1973).

POINT VI

The trial court erred in awarding plaintiff attorney fees equaling $48,380.70, because that sum included $19,597.50 in fees on the $58,500 which was paid by defendant Pracna in compliance with the bond contract before plaintiff retained the services of an attorney, in that under the bond contract plaintiff was only entitled to collect an attorney fee of 33½% on amounts collected with the assistance of an attorney.

A. Standard for Review

This issue relates to the interpretation of the bond contract. As such, it is subject to de novo review. *In re Nelson*, 926 S.W.2d 707, 709 (Mo. App. 1996).

B. Construction of the Contract

The attorneys' fee provision in the bail bond contract reads as follows:

> If upon failure of the parties to comply with any of the terms or conditions of this agreement and should it be necessary for the Company to refer this agreement to an Attorney for collection, the Parties agree to pay an attorney fee in the amount of 33½% whether or not such action proceeds to judgment. (Ex. 1)

There is no dispute that within ten days after Mr. Heartfelt absconded under the bond, Ms. Trimble made demand upon Ms. Pracna for payment of the sum of $58,500, and Ms. Pracna wired said funds to the account of Ms. Trimble. (TR. 554-4A) There has been no suggestion that the payment of those funds represented any failure to comply with the terms of the agreement or necessitated the hiring of any attorney by Ms. Trimble to collect the money. Nonetheless, after the jury verdict was returned, the trial court considered whether it

should award an attorneys' fee of 33½% of the entire jury award of $144,420.00 or if instead the attorneys' fee would be determined after deducting the $58,500 voluntarily paid by Ms. Pracna. If the former calculation is made, the attorneys' fees due would be $48,080.70, whereas the latter calculation would result in an attorneys' fee of $28,783.20, a difference of $19,597.50. The trial court elected to assess the attorneys' fee upon the entire amount of damages assessed by the jury on the contract claim, and as a result, ordered attorneys' fees of 33½% on the $58,500 voluntarily paid by Ms. Pracna. (L.F. 422) Defendant Pracna submits that the trial court's interpretation of the contract was flawed and must be set aside.

The terms of the contract with respect to attorneys' fees are vague and ambiguous. The terms require the indemnitors to pay an attorneys' fee "in the amount of 33½%", but fails to state to what that percentage should be applied. In other words, 33½% of what? Does the contract mean 33½% of the amount claimed, the amount determined to be due under a judgment or the amount actually collected, or, as in this case, the amount net of any set offs to which the indemnitors are entitled? Since the meaning of the contract is susceptible to more than one interpretation by reasonable persons, it is ambiguous. *Eisenberg v. Redd*, 38 S.W.3d 409, 411 (Mo. 2001) (contract ambiguous only if its terms are susceptible of more than one meaning so that reasonable persons may fairly and honestly different in their construction of the terms); *Rodriguez v. Gen. Accident Ins. Co.*, 808 S.W.2d 379, 382 (Mo. banc 1991) (ambiguity arises when there is duplicity, indistinctness or uncertainty in the meaning of the words used).

The interpretation placed upon this ambiguous contract should necessarily favor Ms. Pracna inasmuch as the contract was obviously prepared by A-Advanced Bail Bond Company.

(TR.557-558) *See Graue v. Missouri Prop. Ins. Plcmnt. Fac.*, 847 S.W.2d 779, 785 (Mo. banc 1993) (where contract is fairly open to two or more interpretations, construction will be adopted that is against the party preparing the contract). That interpretation must also be one which will make the contract fair and reasonable between Ms. Pracna and Ms. Trimble. *Hammond v. Wheeler*, 347 S.W.2d 884, 895 (Mo. 1961).

In order to make the contract fair and reasonable, the appropriate interpretation appears to be that the percentage fee will be applied to the amount recovered by Ms. Trimble, either by judgment or settlement after all appropriate credits have been given to the indemnitors. That interpretation would demand that the attorneys' fee calculation take place after the credit was given for the $58,500 paid by Ms. Pracna.

The conclusion that attorneys' fees should not be calculated upon the monies voluntarily paid by Ms. Pracna even before the contract was referred for collection is buttressed by the language in the contract itself. The requirement for the payment of attorneys' fees is conditioned upon the "failure of the Parties to comply with any of the terms and conditions of this agreement." The payment of $58,500 by Ms. Pracna to Ms. Trimble as requested by Ms. Trimble certainly did not represent a failure to comply with the contract. If it did, then Ms. Trimble should have refunded the money immediately to Ms. Pracna. Never has Ms. Trimble suggested that such a refund is due.

In addition, general principles applying to fees which are lawful for an attorney to charge strongly suggest that no fee is due on the $58,500. In *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832, 835 (Mo.App. 1995), the court found that "an attorney is only entitled to fees which are fair and just and which adequately compensate him for his services."

See also In re Connaghan, 613 S.W.2d 626, 632 (Mo. banc 1981) (it is a violation of Missouri attorney disciplinary rules to receive a fee where no services were rendered). There is no contention that any attorney assisted Ms. Trimble in collecting the $58,500 from Ms. Pracna. Ms. Trimble simply requested the money and it was sent. Consequently, no "service" was rendered by an attorney to collect the money by to which to earn a fee.

Defendant Pracna respectfully submits that the trial court erred in its interpretation of the bail bond contract with respect to the calculation of attorneys' fees in that the amount of attorneys' fees should be based upon the contract damages after credit for the $58,500 voluntary payment made by Ms. Pracna and that the judgment should be modified accordingly.

CONCLUSION

The decision of the jury to award nearly every dollar of damages requested by plaintiff on her claim for breach of contract was a foregone conclusion after the trial court decimated the credibility and effect of counsel for Ms. Pracna's closing argument by erroneously declaring the law of the case on four separate occasions. Having been told on four separate occasions that counsel for Ms. Pracna could not be trusted to argue under the law as determined by the judge, the jury simply adopted the damages requested by plaintiff's counsel, including nearly $55,000 in damages for bounty hunter fees which have never been paid by the plaintiff and for which the plaintiff never had an obligation to pay. The errors of the trial court simply created a runaway jury which awarded damages which were neither supported by the law nor the evidence. A new trial on the issue of contract damages is the only solution.

The snowball created by the trial judge's ruling on objections in closing arguments became an avalanche when the jury got to the issue of fraud. In all candor, plaintiff's claim of fraud flies in the face of common sense. How can a bondsman claim to have relied upon statements from a complete stranger in deciding to issue bail bonds where everything from the history of the accused, the charges against the accused, and the statements of the prosecuting attorney loudly proclaimed that the accused is likely to flee, and in fact the bondsman believed that the accused would flee if the bonds are written? On top of all that, how can one recover damages for lost profits when one has never had profits? Those are difficult questions to overcome, but the errors of the trial court enabled this jury to do so. Defendant Pracna respectfully submits that this Court has an opportunity to restore credibility to the judicial process in this case. She respectfully requests the Court to do so by entering a judgment JNOV

against plaintiff for her claim for fraud or, alternatively, ordering a new trial on all issues on plaintiff's fraud claim.

Finally, this Court should give the trial court guidance to correct its calculation of attorneys' fees so that fees are not recovered on funds that were voluntarily paid by Ms. Pracna at the request of the plaintiff and before any lawyers were hired.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

KAREN F. TRIMBLE	)	
Respondent/	)	
Cross-Appellant,	)	
vs.	)	Appeal No. SC86269
	)	
TIMMI ANN PRACNA,	)	
Appellant/	)	
Cross-Respondent.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Pursuant to Rule 84.06(c), counsel for Appellant certifies that this brief complies with the limitations contained therein. There are 19,215 words in this brief. Counsel for Appellant relied on the word count of his word processing system in making this certification.

Pursuant to said Rules, counsel for Appellant certifies that the disk filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Appellant states that Appellant's opening brief in the within cause was by him caused to be served, either by Federal Express or by ordinary mail, postage prepaid, in the following stated number of copies, addressed to the following named persons at the addresses shown, all on the 15th day of October, 2004:

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Subscribed and sworn to before me this 15t^{h} day of October, 2004.

_____
Notary Public

My commission expires: